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No. 2734

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GIDEON M. FREEMAN,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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The Case.

April 20, 1915, an indictment was presented under Section 215 of the Criminal Code, against Gideon M. Freeman, in *five* counts, charging in the *first* count, that Dr. Gideon M. Freeman, alias Paul Allen, doing business at 986 Market Street, San Francisco, under the name of Dr. Jordan, L. J. Jordan Co. and Jordan Museum of Anatomy, a corporation organized under the laws of California, on or about May 15, 1912, under the guise and name of said Jordan's Museum of Anatomy, *devised a* certain *scheme* or artifice *to defraud, or for obtaining money* or property *by means* of certain *false*

pretenses, representations or promise to be *effected by means of the postoffice* establishment of the United States, as follows:

That Dr. Gideon M. Freeman, alias Allen, *should place* or caused to be placed *advertisements in newspapers* of general circulation *published* in the United States, or in letters, booklets or other prints, setting forth in substance or effect that said Dr. Jordan was a physician practicing in San Francisco, and specially qualified to treat private diseases of men, among other diseases, syphilis, gonorrhea and diseases and affections arising therefrom, lost vitality, bladder, kidney, prostate and urinary diseases, and had cured numerous persons afflicted with said diseases, and *by means of said advertisements,* letters, booklets and other prints *he,* said Dr. Gideon M. Freeman, alias Paul Allen, then and there *intended to cause or induce* John Bammer, J. P. Millspaugh, George R. Alberts, Anson Ashford and John Caroway, and divers other persons whose names are unknown, and the public generally, to communicate and open correspondence with Dr. Jordan by means of the postoffice, relative to their real or supposed ailments; that when said persons should communicate with him, Dr. Jordan, whom the defendant knew was not a doctor or person existing in life, *by the means aforesaid,* that said Dr. Jordan should write or communicate with such persons by means of letters placed in the postoffice, in substance and effect stating, with intent to defraud such persons irrespective of symptoms and

even where they indicated health rather than disease, and without any proper knowledge of their real condition, that they were afflicted with diseases which he, Dr. Jordan, could cure, and he would furnish treatments for the cure thereof, upon payment to him of certain sums of money, and by means of said letters so placed as aforesaid by said Dr. Gideon M. Freeman, he intended to cause or induce all of said persons communicating with Dr. Jordan to deliver or send to the address of Dr. Jordan as aforesaid, sums of money for the purpose of procuring from him medicine or treatments skillfully or properly designed or prepared for the cure or alleviation of such diseases with which said persons were afflicted or had been so induced by said Dr. Gideon M. Freeman to believe they were afflicted, which money he should fraudulently convert or appropriate to his own use, and in return therefor he should send or deliver to said persons so sending or delivering to him sums of money, certain medicine or treatment not skillfully or properly designed or prepared, and of little or no value, for the cure of said persons, said *Dr. Gideon M. Freeman* having *no proper or professional knowledge* of their conditions or whether they were diseased or not or whether said medicine or treatment was capable of benefiting said persons, as he then well knew (Tr. 2-5).

That said Dr. Gideon M. Freeman on July 2, 1912, at San Francisco, for the purpose of executing said scheme or artifice, or in attempting so to do, unlaw-

fully, feloniously, knowingly and willfully, placed or caused to be placed in the postoffice, to be delivered thereby, a certain letter upon which postage had been prepaid, addressed to John Bammer, Colusa, California, a copy of said letter being as follows, to wit, setting out the letter (Tr. 5-8):

The other *four* counts are identical with the *first,* except that the *letter* set out is different, the date of mailing is different, and the person to whom the letter was mailed is different; in the *first* count the letter was mailed to *John Bammer,* in the *second* count to *J. P. Millspaugh,* in the *third* count to *George R. Alberts,* in the *fourth* count to *Anson Ashford,* and in the *fifth* count *to John Caroway* (Tr. 6-29).

The defendant *demurred* to this indictment upon many stated grounds (Tr. 34-36).

Defendant requested the Court to take the case from the jury, which was denied (Tr. 239-240).

Upon defendant's plea of not guilty, the case was tried, and a verdict rendered finding defendant guilty as charged (Tr. 43).

Motion for a new trial and an arrest of judgment were made and denied (Tr. 44-45).

Thereupon the Court adjudged that defendant pay a fine of $1000 and *be imprisoned for one year* in the County Jail of Alameda County.

This writ of error was sued out, and the case is thereon before this Court, with defendant's bill of exceptions.

Argument.

I.

THE EVIDENCE ESTABLISHES THAT THE LETTERS SET OUT IN THE INDICTMENT AND THE OTHER LETTERS SET OUT IN THE EVIDENCE, THE WRITING AND MAILING OF WHICH ARE CHARGED IN THE INDICTMENT TO BE A VIOLATION OF SECTION 215, CRIMINAL CODE, WERE SOLICITED, ASKED FOR AND REQUESTED BY UNITED STATES POSTOFFICE INSPECTORS IN LETTERS WRITTEN BY THEM AND SENT THROUGH THE MAILS TO DR. JORDAN, AS TEST CORRESPONDENCE; THAT THEY WERE MAILED IN RESPONSE TO THESE INSPECTORS' LETTERS; AND THAT THE ACTS CHARGED WERE INITIATED, CAUSED AND INDUCED BY THE UNITED STATES POSTOFFICE INSPECTORS, AND THEREFORE WERE NOT CRIMINAL AND DO NOT CONSTITUTE A CRIME.

That the evidence in the record demonstrates, upon the express declarations of the Government's witnesses, that *the crime charged* against the defendant in the indictment, under Section 215 of the Criminal Code, because of the facts alleged and the things done, as set out in the indictment, was *initiated and solicited* by the Government, acting by and through G. A. Leonard and Edmond Honvery, its official postoffice inspectors; these inspectors selected the *fictitious* names of John Bammer, J. P. Millspaugh, George R. Alberts, Anson Ashford and John Caroway stated in the indictment, *all fictitious persons*, and through B. D. Beckwith, George E. McMurray, F. D. Crable, F. W. France and W. L. Leonard, *all postmasters* acting under the directions of said Inspectors G. A.

Leonard and Edmond Honvery; who, to quote Inspector "Honvery" (Tr. 117-120), "As part of my business, I supervised certain *tests,* what was called *'test correspondence',* with reference to Dr. L. J. Jordan here, or the Jordan Museum of Anatomy, under orders directly from the chief inspector who was my predecessor under the postmaster. I am now chief inspector. *Upon the initiative* of the chief inspector *this investigation was begun.* This package is a file of *test* correspondence *conducted by me under the name* of Anson Ashford, Buckley, Washington, *with* Dr. Jordan, 986 Market street, San Francisco. The *first act done* under the name of Anson Ashford *by me* is this paper here, a carbon copy of a *letter,* which was *written by me:* 'Buckley, Wash., Oct. 12, 1912. Dr. Jordan, San Francisco, Cal. Dear Doctor: I have seen your ad. in the papers and as I *would like to consult you* about my case, you could *let me know full particulars about your treatment. Hoping to hear from* you soon, I am, Yours very sincerely, Anson Ashford, Gen. Del.' " (Tr. 117-118).

The indictment, in each count, names *five persons,* John Bammer, J. P. Millspaugh, George R. Alberts, Anson Ashford and John Caroway, and charges that defendant *by means of advertisements* placed or caused to be placed in certain *newspapers* of general circulation *published* in the United States, *or* in letters, booklets or prints, containing certain statements, the defendant *intended to cause or induce* these five persons and others unknown, *to*

communicate and open correspondence with Dr. Jordan *by means* of the postoffice *relative* to their ailments; that when such persons would communicate with Dr. Jordan he should write or communicate with them by letters placed in the postoffice, and state to them, *with intent to defraud them,* that they were afflicted with diseases which he could cure and would furnish treatments upon payments of money, and by said letters defendant intended to cause or induce them to send to Dr. Jordan money for medicine or treatments for diseases with which they were or which defendant had induced them to believe they were afflicted, which money defendant should *fraudulently* convert or appropriate, and in return send them medicine or treatment not skillfully or properly designed or prepared and of little or no value for their cure, *the defendant* having no proper or professional knowledge of their condition or whether they were diseased or not, or whether the medicine or treatment was capable of *benefiting* them, as defendant well knew; and on July 2, 1912, for the purpose of executing said scheme and artifice, defendant placed or caused to be placed in the postoffice to be thereby delivered a letter addressed to said *John Bammer,* which the *first* count sets out; and on February 25, 1913, a letter to *J. P. Millspaugh,* which the *second* count sets out; and on July 15, 1912, to *George R. Alberts,* which the *third* count sets out; and on November 2, 1912, to *Anson Ashford,* which the *fourth* count sets out; and on

September 21, 1912, to *John Caroway,* which the *fifth* count sets out.

Now the *evidence* for the Government expressly proves by *Edmond Honvery* (Tr. 117-130), that *he* was a *postoffice inspector,* and as part of his business *he supervised* certain *test correspondence with* reference to Dr. Jordan or the Jordan Museum of Anatomy, getting his orders from the chief inspector (Tr. 117).

> "*Upon the initiative* of the chief inspector *this investigation was begun.* This package purports to be a file of test correspondence conducted *by me* under the *name* of Anson Ashford, Buckley, Washington, *with* Dr. Jordan, 986 Market street, San Francisco.
>
> "*The first act done* under the name of Anson Ashford *by me* is this paper here, a carbon copy of *a letter,* which was written October 12, 1912. I will read it," and the postoffice inspector *reads* the letter written by him to Dr. Jordan, above copied herein (Tr. 117-119).

Then follows certain *Anson Ashford* correspondence (Tr. 120-129).

Inspector *Honvery continues* (Tr. 118-120):

> "The *original* of this *letter* was put in an envelope, a stamp put on it, *addressed to Dr. Jordan,* 986 Market street, San Francisco, California, then it was placed with this letter of instructions in an *official* envelope and *sent to the postmaster* at Buckley, Washington, *with instructions to mail it* at Buckley, Washington, and *if any reply* or any *letters* were received at Buckley, Washington, addressed to Anson Ashford, General Delivery, they *were to be sent to me* at Washington, *unopened* under *official*

cover. *In response to that, the first letter* received from Dr. Jordan came in an envelope postmarked San Francisco, California, October 5, 1912, addressed to Mr. Anson Ashford, General Delivery, Buckley, Washington. Then followed that a letter postmarked San Francisco, California, October 25, 1912. *Then I filled out* the symptom blank on October 29, 1912, and *sent it to the postmaster* at Buckley, Washington, *for mailing,* accompanied with $2.50. It was sent by registered mail. I received a return registry card signed by Paul Allen, and a letter mailed at San Francisco, California, November 7, 1912; another letter mailed November 18, 1912; another letter postmarked December 3, 1912, San Francisco, Cal.; a further letter postmarked San Francisco, Cal., December 14, 1912; another letter postmarked December 26, 1912; another letter postmarked January 5, 1913, and a last letter postmarked June 30, 1913. These various letters were received by me *under official cover from the postmaster* at Buckley, Washington, unopened. I opened them in Washington. *I sent out the first letter* and the symptom blank and received nine letters. I sent $2.50 and two postage stamps, $2.54, and registered the letter. I did *not* take any treatments. *I sent* a sample of urine with the symptom blank. The contents of that bottle are water, a little tea, a little ammonia, and glucose. *I sent* a similar bottle of the same kind of content. There was mixed four ounces of the stuff, and two ounces were sent and two ounces were retained. This is the two ounces that I retained" (Tr. 118-120).

We continue to quote Inspector *Honvery's* testimony (Tr. 129-130):

"I am not a chemist. Studied chemistry a little bit in school. My object in putting

glucose in this sample was *I tried to show a case with an indication of diabetes.* I thought it would produce evidence of diabetes. The other symptoms are perfectly healthy. *I put ammonia in to imitate the smell.* That is all. That did not indicate anything in the way of disease. I have not consulted any physician or chemist about what constituted healthy urine. *I made the sample to resemble urine* to see whether a proper examination was made of it. *It looked like urine and smelled like urine*—it did, but it does not now. I have not looked at the bottle for some time and I do not know how it smells. There is no formula in my office of instructions as to what chemicals are put in water for the purpose of producing this effect. It is all left to our discretion. What induced me to use these particular ingredients in this water was: My purpose was not to deceive the doctor, but to give him something that looked like urine, and for him to make the proper tests, recognized, of urine. I do not know whether that was the proper amount of sugar that appears in urine in diabetes, but diabetes is a disease which is shown in the urine by excessive sugar. I know that. I tried to introduce that. I also put in ammonia for the purpose of giving some odor; also some tea to give the color. I thought I would produce a liquid that looked like urine and smelled like urine, and had a diabetes condition in it'' (Tr. 129-130).

Then follows the *Anson Ashford* correspondence (Tr. 120-129).

Five postmasters, each and all *acting officially,* under and by direction of the chief postoffice inspector, B. D. Beckwith, postmaster at Colusa, California, mailed the letters sent him by the chief

inspector under the name of *John Bammer* (Tr. 49-51); George E. McMurray, postmaster at Cherry Creek, Nevada, the letters sent him under the name *J. P. Millspaugh* (Tr. 51-53); F. D. Crable, postmaster at Flagstaff, Arizona, the letters sent him under the name of *George R. Alberts* (Tr. 53-55); F. W. France, postmaster at Buckley, Washington, the letters sent him under the name of *Anson Ashford* (Tr. 55-56); and W. L. Leonard, postmaster at Oroville, Butte County, California, the letters sent him under the name of *John Caroway* (Tr. 57-60); these *five* postmasters deposited in the postoffice the official test correspondence to Dr. Jordan, soliciting, causing, inducing and in response and in reply to which the *five* letters were sent which are set out in the five counts of the indictment under the *fictitious* names and to the *fictitious* persons above and in the indictment named.

The *test* letters prepared by the Government official postoffice inspector, *soliciting* correspondence by means of the postoffice with and from Dr. Jordan, will be found in the record as follows:

Letter from John Bammer, Transcript, p. 61;
Letter from J. P. Millspaugh, Transcript, p. 72;
Letter from J. P. Millspaugh, Transcript, p. 88;
Letter from John Caroway, Transcript, p. 92;
Letter from John Caroway, Transcript, p. 96;
Letter from John Caroway, Transcript, p. 97;
Letter from George R. Alberts, Transcript, p. 107;
Letter from George R. Alberts, Transcript, p. 109;

Letter from George R. Alberts, Transcript, p. 113;
Letter from Anson Ashford, Transcript, p. 118;

We respectfully submit that the evidence of the Government shows that the United States Postoffice Inspectors wrote *official* letters sent through the mails to Dr. Jordan asking for and requesting that he send to them through the postoffice, *the very identical letters* which the indictment charges that, because these requested letters containing the information asked for by them, were sent to them, Section 215 of the Criminal Code was violated.

If, under their own *names* and their *official* position as United States Postoffice Inspectors, these Government officers had written the letters that they did write to Dr. Jordan, and the letters and information which their letters called for and requested had been sent through the postoffice *addressed* to these Government officers in *their* own names and with their *official designation* thereon, there can be no possible doubt that the sending of these letters set out in the indictment would *not* constitute a crime under the law or said Section 215 of the Criminal Code. The Government Inspectors themselves expressly swear as witnesses that *"As part of their (my) business"*, they "supervised certain *tests,* what was called *test* correspondence, with reference to Dr. L. J. Jordan here or the Jordan Museum of Anatomy. Directly under the chief inspector" (Tr. 117). That *"Upon the initiative* of the chief inspector this investigation was begun", and that these letters were *"test* corre-

spondence *conducted by them* (me) under the names" stated in the indictment. That "*the first* acts done by them (me) were (are) those (the) letters"; that these *original* letters were sent by them in *official* envelopes to postmasters with instructions to mail them, and send to them unopened the reply under *official* cover; and that "*in response to that,* the *first* letter received from Dr. Jordan came in an envelope addressed to the name they gave" (Tr. 118-119).

In the case of Woo Wai v. U. S., 223 Federal 414, 415, et seq., this Court by Judge Gilbert rendering the opinion, said:

> "Woo Wai and his associates, therefore, *although they were not aware of the fact,* were engaged in an act *which was not to result* in an accomplished offense against the laws of the United States.
>
> "Second. We are of the opinion that it is against public policy to sustain a conviction obtained in the manner which is disclosed by the evidence in this case, taking the testimony of the defendants to be true, and that a sound public policy can be upheld only by denying the criminality of those who are thus induced to commit acts which infringe the letter of the criminal statutes. Some of the courts have gone far in sustaining convictions of crimes induced by detectives and by state officers. This is notably so of the decision in People v. Mills, 178 N. Y. 274; 70 N. E. 786; 67 L. R. A. 131. But it is to be said, by way of distinguishing such cases from the case at bar, that in all of those cases the criminal intention to commit the

> offense had its origin in the mind of the defendant. Thus in People v. Mills, it was the defendant who made the first suggestion looking toward the commission of the criminal act, and for the commission of that act the district attorney furnished him opportunity and lent him aid. In the case at bar, *the suggestion of the criminal act came from the officers of the government. The whole scheme originated with them.*"

This same principle of distinction between a decoy and the Government officers *initiating* the crime charged is illustrated in the case of United States v. Healy, 202 Fed. 349, where the Court said:

> "Decoys are permissible to entrap criminals, *but not to create them;* to present opportunity to those having intent to or willing to commit crime, but not to ensnare the law-abiding in unconscious offending. Where a statute, as here, makes an act a crime regardless of the actor's intent or knowledge, ignorance of fact is no excuse if the act be done voluntarily; *but when done upon solicitation by the government's instrument to that end ignorance of fact* stamps the act as involuntary, *and excuses, or at least estops the government from a conviction.* In the former case the actor is bound to know the facts, and acts at his peril. In the latter case he is relieved of the obligation *by the government's invitation,* which is of the nature of fraudulent concealment and deceit, and, if not consent, yet doth work an estoppel. Though the seller has violated the statute, *he was the passive instrument of the government, and his is a blameless wrong for which he cannot be justly convicted.*"

II.

THE EVIDENCE ENTIRELY FAILED TO PROVE MATERIAL ALLEGATIONS OF THE INDICTMENT; AND AFFIRMATIVELY PROVED THE CHARGE MADE IN THE INDICTMENT TO BE FALSE. THERE IS NO EVIDENCE IN THE RECORD THAT DEFENDANT EVER PLACED OR CAUSED TO BE PLACED OR PUBLISHED ANY ADVERTISEMENTS IN NEWSPAPERS, ETC. THERE ARE NO NEWSPAPERS OR ADVERTISEMENTS IN THE RECORD.

The indictment charged that the defendant Dr. Gideon M. Freeman *devised* a certain *scheme to defraud* or obtain money by false pretenses, representations or promise to be effected by means of the postoffice, and charges the *scheme and its particulars* to be, that Dr. Freeman should place or cause to be placed *advertisements in certain newspapers of general circulation published* in the United States, or in letters, booklets or other prints, *wherein* it should be *set forth* in substance or effect, certain things (specifying them), *by said advertisements*, etc., then and there *intending to cause or induce* Bammer, Millspaugh, Alberts, Ashford and Caroway, and the public generally, *to communicate and open correspondence* with Dr. Jordan *by means* of the postoffice, *relative* to their real or supposed ailments, and that *when* they should communicate with said Dr. Jordan, *that* the said Dr. Jordan should write or communicate with them by means of the postoffice, making certain pretences, representations and promises, whereby Dr. Freeman intended to defraud said persons (Tr. 3-4).

There is no evidence in the record to prove that Dr. Freeman or any one else, ever placed or caused to be placed or *published in* any *newspapers,* or newspapers of general circulation, or in any letters or booklets or other prints, *advertisements* of any kind or character whatever, or any advertisements, or *advertisements* in letters, booklets or other prints, wherein it should be or was set forth in substance or effect or at all, anyone or more of the things, pretences, representations, promises or statements, *charged* in the indictment, in each one of the five counts, as *constituting the scheme and the particulars of the scheme,* charged to have been *devised* by Dr. Freeman *with intent to defraud by means of* the postoffice.

Therefore, at the outset, there is an absolute failure of proof to establish *the devising of* the charged *scheme to defraud.* It was not proved or attempted to be proved either in substance or effect, either directly or indirectly, either by the *published* newspaper, letters, booklets or other prints, constituting such *advertisements,* that the defendant, Dr. Freeman, *or any other person,* ever placed or caused to be placed, *advertisements* in certain or any *newspapers* of general circulation *published* within the United States, or *advertisements* in letters, booklets or other prints, wherein it should be set forth in substance or effect, the matters and things charged in the indictment.

By means of such *advertisements,* the indictment charges were the *scheme* to defraud *devised* by Dr.

Freeman, *intending* thereby to *induce and cause* the said named persons and the public generally, *to communicate and open correspondence with* Dr. Jordan *relative* to their real or supposed ailments, by means of the postoffice; and *then, when* said persons should *communicate with* Dr. Jordan, Dr. Freeman, *through letters* to said persons by means of the postoffice, intended to defraud them out of money by fraudulent promises to cure them, etc., for money (Tr. 3-4).

These *advertisements* in newspapers *published* in the United States, expressly charged in the indictment, are an essential part of, in practical truth *the entire,* artifice and scheme which the indictment charges. The proof must correspond with the averments, and nothing descriptive of the offense can be rejected as surplusage. This is the settled rule, in other federal jurisdictions and, as well, in the state jurisdictions. In United States v. Thomas, 28 Fed. Cas., No. 16,473, the Court said:

> "Perhaps it might have been suggested, if the question had been at all argued on the part of the United States, that the indictment states that the nutmegs therein mentioned were imported contrary to law, and that so much of the indictment as states in what the illegality of the importation consisted, may be rejected as surplusage. But the short answer to that is, that this is a part of the description of the offense, and cannot be rejected as surplusage, even if the indictment would have been good if the particular illegality of the importation had not been set forth; for, if an indictment set out the offense with greater particularity than is

> required, the proof must correspond with the averments, and nothing descriptive of the offense can be rejected as surplusage (citing cases). But it is believed" the court goes on, "that the indictment would have been bad if the allegations of illegality of the importation had been simply that it was contrary to law—without showing *the facts constituting* such illegality, or stating the *particular illegality* intended to be proved."

In United States v. Howard, 26 Fed. Cas., No. 15,403, it is said by Mr. Justice Story:

> "But no allegation, whether it be necessary or unnecessary, whether it be more or less particular, which is descriptive of the identity of that which is legally essential to the charge in the indictment can ever be rejected as surplusage."

In United States v. Brown, 3 McLean 233, the Court said:

> "If the prosecutor choose to state the offence with greater particularity than is required by the statute, he will be bound by the statement, and must prove it as laid."

An application of this doctrine, the strictness with which it is insisted upon, is furnished by an eminent judge, Mr. Justice Curtis, in United States against Foye, 25 Fed. Cas., No. 15,157. Mr. Justice Curtis says:

> "But a far more difficult question arises under the other part of the objection. The indictment alleges, not only that this letter was intended to be conveyed by post, but describes where it was to be conveyed; it fixes the *termini* as Georgetown and Ipswich. The allegation is,

in substance, that the letter was intended to be conveyed by post from Georgetown to Ipswich. The question is, whether the words, from Georgetown to Ipswich, can be treated as surplusage. It was necessary to allege, that the letter was intended to be conveyed by post. The words, from Georgetown to Ipswich, are descriptive of this intent. They describe, more particularly, that intent which it was necessary to allege. In United States v. Howard (Case No. 15,403), Mr. Justice Story lays down the following rule, which we consider to be correct: 'No allegation, whether it be necessary or unnecessary, whether it be more or less particular, which is descriptive of the identity of that which is legally essential to the charge in the indictment, can ever be rejected as surplusage'. Apply that rule to this case. It is legally essential to the charge to allege some intent to have the letter conveyed somewhere by post. Suppose the indictment had alleged an intent to have it conveyed between two places where no postoffice existed, and over a route where no post-road was established by law. Inasmuch as the court must take notice of the laws establishing postoffices and post-roads, the indictment would then have been bad; because this necessary allegation would, on its face, have been false. Words, therefore, which describe the *termini* and the route, and thus show what in particular was intended, do identify the intent, and show it to be such an intent as was capable, in point of law, of existing.

"And we are obliged to conclude that they cannot be treated as surplusage, and must be proved, substantially, as laid. We are of opinion, therefore, that there was a variance between the indictment and the proof; and that, for this cause, a new trial should be granted."

In Potter v. United States, 155 U. S. 438, 445, the Supreme Court said:

> "It is generally true as claimed that where an indictment is unnecessarily descriptive, even the unnecessary description must be proved as laid."

And the Court indicates that the general rule invoked, was not in point, and for the reason that it was not necessary to prove the descriptive matter "otherwise than as it is stated". Said the court, to make the statement complete:

> "It is generally true, as claimed that *where an indictment is unnecessarily descriptive, even the unnecessary description must be proved as laid;* but that proposition does not seem to be in point, for it is not claimed that the testimony did not show just such a writing as is charged to have been made by the defendant, and surely it cannot be claimed that *unnecessary matter of description* must be proved *otherwise than as it is stated."*

See also

United States v. Porter, 3 Day 283, 285-6.

The same rule obtains in the state jurisdictions:

> "It is a rule of practice which obtains in criminal as well as civil actions that the allegations upon which the action is founded and the proof adduced must meet and correspond. It is a further rule well settled and established that, where a particular fact or circumstance is alleged as constituting or forming a part of the descriptive identity of the offense charged, the prosecution is held and limited to that particular state of facts in the proofs adduced to establish the crime; and, further,

the court in its charge to the jury is also limited to the matter charged as constituting the offense, and that to submit to the jury in the charge other matters constituting the offense which are not alleged is a radical and fundamental error, which will necessitate a reversal because this court cannot ascertain in such case whether or not the party may not have been convicted on matters not charged against him in the indictment or information. In other words, where the allegation is descriptive of the offense, the guilt of defendant must be found, if at all, upon the ground alleged in the information or indictment."

Randle v. The State, 12 Tex. Cr. App. 251;

Clark v. Commonwealth, 55 Ky. 213, 214;

Commonwealth v. McGowan, 58 Ky. 369, 370;

State v. Newland, 7 Iowa 242;

Helmerking v. Commonwealth, 37 S. W. 264, 265.

III.

Errors in Rulings on Trial.

THE TESTIMONY OF THE WITNESS WALKER WAS NOT ADMISSIBLE, AND SHOULD HAVE BEEN STRUCK OUT ON DEFENDANT'S MOTION.

H. C. Walker testified for the Government, that he resided in San Jose for about nine years; that he was 52 years old. "*I visited* the place here in San Francisco known as the Jordon Museum. Prior to visiting that place I had correspondence with the institution."

FIRST:

"Mr. FAIRALL. Q. Is this for the purpose of showing a *similar* offense?

Mr. PRESTON. Yes.

Mr. FAIRALL. We object to it upon the ground that no offense has yet been shown against this defendant, and until that fact is established, *similar* offenses cannot be shown. We therefore object upon the ground that it is immaterial, irrelevant and incompetent and is violating one of the fundamental rules of evidence and the rights of defendant to introduce such evidence" (Tr. 131).

"The COURT. Objection overruled. Exception" (Tr. 131).

The witness then testified that he could not tell how many letters he wrote; he guessed about three, and that one letter shown him was a copy of one he wrote; that he did not keep copies of the letters he wrote the institution; that he received replies to these letters; and he then identifies letters received by him from Dr. L. J. Jordan.

He received *cards* from the Dr. Jordan Company —Dr. L. J. Jordan. *Visited* the place eight months after the first correspondence, and again several months later, and seven or eight times in all, probably *ten* times.

"I commenced this *treatment* in September, 1912, and quit doctoring there before the holidays of 1914. I filled out the question and symptom blank and sent them back. I told them I was troubled with a weak back, that was my main trouble, and then afterwards *I began to take medicine. I took it for about eight months* before I visited them and *then came*

down to visit them, and there was *a doctor there examined* me, and told me that my case was more complicated than he thought before, and I would have to take a different treatment. My condition had not improved any during the eight months. I paid them about $200. to $280. I am not positive about the man who examined me when I went there. There was a man that looked very much like Dr. Freeman. *I am not positive it was Dr. Freeman.* It was a man that looked very much like him. I only saw the man twice. He was a stout heavy-set man. That is all I know. He did not tell me his name. *I was examined* in their inner office. When I went there I called for Dr. Jordan, and he said that the doctor was not in, to wait a few minutes, and this gentleman came to the door and asked me into the room. That gentleman *examined* me. He told me *I was troubled with prostate glands* and sexual weakness. He said my case was stubborn and required more expensive medicines, and he wanted me to pay $100. for treatment. I did but not at that time. I told him I did not have the money then, and he wanted me to pay a part down and pay installments. I did not do anything then. I went home. A few days later he wrote me a letter regarding that I was leaving it alone too long, and not taking up the treatment, so I made up my mind that I would try it again, and I commenced treating and *treated on for several months again.* I went back and *was treated the next time by Dr. Rice.* I did not see the man *who had treated me before.* I told the doorkeeper I wanted to see Dr. Jordan, and he told me he would be in in a few minutes. He did not mention any name. I went into the waiting room and waited for him. After I was there probably 20 minutes, there was a man came to the door from the opposite room and called me

into the office and made an examination. *I did not make any inquiries about Dr. Jordan"* (Tr. 130-134).

SECOND.

"MR. PRESTON. We offer to read a part of this correspondence.

Mr. FAIRALL. We move to strike out all of this testimony upon the ground that it does not show a circumstance in this: that the evidence shows that this man *took the treatment in person, and after a personal examination,* and there is no similarity between the cases at all" (Tr. 134).

The motion was denied and exception was taken.

This witness, H. C. Walker, continued:

"I sent real urine; obeyed instructions just as I got them. I took the medicine, having received a great deal of it. I followed the instructions of the doctor. I went one time to the office and had an examination. He did not give me much of an examination. *He tested my urine, and examined my lungs and back, the prostate glands.* That was some examination. *He examined my prostate gland with his finger.* He examined the prostate gland with his finger *through the rectum,* and said I had enlarged prostate glands. He did not explain why he examined me for that purpose. Mr. Robinson was the doorkeeper there. *He looks a great deal like Dr. Freeman.* That is the man that was at the door, I think. That was not the man that examined me. *I do not pretend to say that it was Dr. Freeman* that treated me. I wrote to the Dr. Jordan Museum" (Tr. 143-146).

THIRD.

"Mr. FAIRALL. We wish now to renew our *motion to strike out* this testimony on the ground that it shows an entirely different state of facts. It is not within the time alleged in the indictment, and it is *based* upon *treatments, personal interview* and personal examination of the urine, and *personal examination of the patient* in the office, and it would not show a similar act, because it is not similar; it has nothing to do with the same conditions; this treatment, so far as it appears here, is in actual, absolute good faith; there is nothing here to brand these statements as false or fraudulent, or made for the purpose of defrauding. Apparently on its face and so far as appears from the testimony, the statements were made in absolutely good faith for the treatment of the patient" (Tr. 145-146). Denied; exception.

"Mr. FAIRALL. Q. *You were in fact suffering* from this trouble which was mentioned in this complaint to the doctor, were you not?

A. *Yes.* But I do not know that I was suffering exactly for what they were treating me. I was suffering from a weak back, and they claimed sexual weakness also. I did not claim so. It is not a fact that I have suffered from sexual weakness but very little. I may have suffered some time" (Tr. 146).

There is *no evidence* that any of *these letters* allowed to be read during *Walker's* testimony, was ever mailed or deposited in or delivered by *the post-office or through the United States mails;* and therefore, these letters were erroneously admitted and were prejudicial to defendant.

The witness Walker testifies to writing and receiving letters showing correspondence with the

Dr. Jordan Museum; but there is not a word in his testimony showing that he received these letters or any of them through the postoffice, or that they ever were mailed or deposited in the postoffice.

Again, the testimony of Walker was inadmissible, because his case was and his testimony showed, the actual examination and treatment by doctors of Walker, and that he was actually ill and suffering from his ailments and was given and took treatment and medicine therefor.

The objections should have been sustained and Walker's testimony should have been struck out on the several motions of defendant to that effect.

IV.

THE EVIDENCE OF THE WITNESS BOERNER WAS INADMISSIBLE. HIS TESTIMONY WENT ONLY TO MATTERS OCCURRING BETWEEN MAY, 1909, AND OCTOBER, 1910, WHILE THE CHARGES IN THE INDICTMENT INVOLVE THE PERIOD BETWEEN JULY, 1912, AND AUGUST, 1913. THE VARIOUS OBJECTIONS OF DEFENDANT TO PARTS OF THIS EVIDENCE SHOULD HAVE BEEN SUSTAINED.

Edward *Boerner* testified for the Government, that between May 5, 1909, and October, 1910, he was employed by the Jordan Museum as stenographer and cashier (Tr. 147). That he got his instructions from *Paul Oesting* as to carrying on the business (Tr. 149). Could not say whether Dr. Freeman ever examined the books. License was issued

in name of G. M. Freeman (Tr. 150). Dr. Freeman had access to the books if he wanted to look at them. The *local* business was the greatest. I could not say that Dr. Freeman ever looked at the books (Tr. 157). *Mr. Oesting* generally told me what to put in the letters (Tr. 160).

> "Dr. Freeman was *not* present when that *form* of letter was made. He *never* instructed me at all about these letters. I think he prescribed for a patient once during the year I was there. He prescribed for some one who called at the office. It was *not* in regard to sending out letters by mail. *He had nothing to do with that,* so far as I know" (Tr. 163).
>
> *"Most of their business was done through calls at the office;* quite a few of the cases went through the mail, a good many. The major portion of the business, that is, in money, came locally" (Tr. 163).
>
> "I do not remember of his giving instructions to employees in the management of the business, or of his taking any part in things of that kind. He did not have an office of his own there. Paul Oesting appeared to be the one from whom we took our instructions. We would go to him if we wanted any instructions" (Tr. 164).
>
> "I do *not* remember that *Dr. Freeman ever instructed me to send out letters"* (Tr. 164).

The evidence of this witness was inadmissible and prejudicial, and the objections made and motions to strike out should have been sustained.

V.

THE MOTIONS OF DEFENDANT AT THE CLOSE OF THE GOVERNMENT'S CASE TO STRIKE OUT ALL OF THE EVIDENCE, AND TO TAKE THE CASE FROM THE JURY, SHOULD HAVE BEEN GRANTED; BECAUSE A FAIR CONSIDERATION OF ALL THE EVIDENCE DOES NOT PROVE THE GUILT OF DEFENDANT, AND ITS ONLY TENDENCY IS TO SHOW THAT HE IS INNOCENT OF THE CRIME CHARGED AGAINST HIM.

At the close of the Government's case the defendant moved the Court to strike out all of this evidence and to take the case from the jury, as follows:

> "Mr. Fairall. Now, if your Honor please, we desire to make a motion on behalf of the defendant for the purpose of the record. We move that the Court now strike out the testimony upon the ground that they have in no way connected the defendant with the commission of the alleged offense, and that they have not shown nor attempted to show that he sent any of the letters mentioned in the indictment, knew of their being sent, ever heard that they had been sent, or in any way assisted or aided or abetted or encouraged anyone else in sending them, or that he had anything to do with sending them. Upon the further ground that no connection has been made between him and the management of this business, other than the fact that he was an officer of the corporation, that he drew the dividends which came to him as a stockholder of the corporation, and that he had no knowledge whatever of the transaction or manner of the transacting of business; upon the further ground that there has been no attempt to show that he ever saw any of these letters, that he ever handled them, that he ever gave any instructions about sending them, that he ever consulted, or that he

ever advised or ever knew of their being sent; for that reason, we think the testimony has always failed to connect him with the commission of any offense. I understand it to be the law that a defendant charged as this defendant is charged, not as a part of a conspiracy, but as an individual defendant, in order to connect him with the perpetration of the crime, a state of facts must be shown which proves or at least tends to prove that he not only had the opportunity which counsel has shown or attempted to show with much elaboration here, to commit a crime, but that he actually knew that a crime was being committed; knowledge must be brought home to him of the commission of the crime, or if he did not actually assists in the perpetration of it, it was carried on with his connivance and consent. I think that is a very liberal statement of the law. None of these things in any way, shape, or form have been shown.

The COURT. The motion will be denied.

Mr. FAIRALL. I except. We now move upon the same grounds that the case be taken from the jury for the reason that none of these acts have been shown, and there is no evidence which in the slightest degree tends to support the claim of the prosecution that the defendant was in any way connected with the commission of this offense.

The COURT. That motion also will be denied.

Mr. FAIRALL. Exception" (Tr. 238-240).

These motions should have been granted, as there is no evidence in the record connecting Dr. Freeman with the preparation, sending out or mailing of any of the letters in the indictment or in the record, or with devising any scheme or artifice to defraud, or using the mails or the postoffice to that end, or aided,

abetted, counseled, commanded, induced or procured the commission of the crime charged.

There is not sufficient evidence in this record to show that, considering all of the evidence in the record, that any *crime* or violation of Section 215 Criminal Code was committed.

The whole evidence proves, not only that Dr. Freeman is not guilty of any crime, but that the allegations of the indictment were not proved.

The indictment charges that it was intended by Dr. Freeman to defraud each of said persons *irrespective* of the symptoms communicated and even in cases where the symptoms indicated health rather than disease, and without any proper knowledge of the condition of said persons, that they were afflicted with diseases which he, Dr. Jordan, could cure, and would furnish treatments for the cure of such alleged diseases, upon payment of money, to procure medicine or treatments skilfully or properly prepared or designed for the cure or alleviation of the diseases with which they were or had been induced by Dr. Freeman to believe they were afflicted, and in return for such money, Dr. Freeman should fraudulently appropriate the money, and send to them certain medicine or treatment not skilfully or properly designed or prepared, and *of little* or no value for the cure of said persons, said *Dr. Gideon M. Freeman* then and there having no proper *or professional* knowledge of such person's condition or whether they were diseased

or not, or whether said medicine or treatment was capable *of benefitting* said persons, as he well knew (Tr. 4-5).

Now take the proofs of these charges and it is obvious that the charges are not proved, but on the contrary, it is shown that *no medicine or treatment was ever sent* to any of these persons at all—Inspector *Honvery* (Tr. 119) did not take any treatments, but did send a sample of *urine* with the symptom blank, and says he made up the fluid with water, tea, ammonia and *glucose;* that *he tried* to show an indication of *diabetes,* and put in glucose, and ammonia to imitate the smell; that his purpose was to produce something that looked like urine, smelled like urine, and had a diabetes condition in it (Tr. 130). The letter in reply (Tr. 122-123), states the urine shows sugar, and a condition of diabetes, advises that the answers to symptoms 16 and 22 (Tr. 120-121) "dreaming off nights", and "emissions of semen at night with dreams", shows weak condition which should not be allowed to continue, and advises him to get the services of a competent and reputable physician, whether he treats with Dr. Jordan or not (Tr. 123).

Inspector *Leonard* illustrates under the name of John Caroway, a similar result. He sent urine and reply informed him analysis was not satisfactory, same as ordinary water (Tr. 100), and to send another sample, which he did, of water, tea leaves, ammonia and *adding* to this sample *salt* (Tr. 96-97),

and received reply that it indicated albuminous material present, probably indicating waste energy and excessive losses of vital fluids (Tr. 100). And under name of J. P. Millspaugh, a like result, showing competent analysis of urine (Tr. 80-81).

The witness *Dr. Fletcher McNutt* (Tr. 196-200), explains great difficulty of ascertaining whether urine is or not urine (Tr. 197), and says: "If a man patient were to send me a bottle of liquid that *looked* like urine, without testing it to find out whether it was or not, *I would assume that it was*" (Tr. 199).

Dr. Freeman, the defendant, was educated at Lake Forest College in North Carolina, was a soldier in the Civil War, and *graduated* in medicine in 1873, and practiced medicine over *thirty* years (Tr. 250).

No treatments were ever had by any of these persons, and no medicines were ever sent to any of them. Of course, these *five* persons named in the indictment and in these letters were *fictitious* persons, and these five *names* only were assumed by the Government postoffice inspectors in carrying on this *"test correspondence"* (Tr. 117-118).

VI.

THE EVIDENCE IS INSUFFICIENT TO JUSTIFY THE VERDICT AGAINST DR. FREEMAN, AND DOES NOT JUSTIFY A CONCLUSION THAT HE DEVISED THE SCHEME TO DEFRAUD BY MEANS OF THE POSTOFFICE CHARGED IN THE INDICTMENT, OR THAT HE EVER DID A CRIMINAL ACT, OR WAS IN ANY WAY CONNECTED WITH OR HAD KNOWLEDGE OF ANY SUCH SCHEME OR ACTS AS CHARGED IN THE INDICTMENT, AND THE EVIDENCE SHOWS THAT HE IS INNOCENT OF THE CRIME CHARGED AGAINST HIM.

There is no evidence in the record that Dr. Freeman was ever guilty of or committed a wrongful or criminal act, or that he ever did, or aided, abetted, counseled, commanded, induced or procured the commission of any one of the acts charged against him in this indictment; and there was no proof produced upon his trial that would or could justify, either to a moral certainty or beyond a reasonable doubt, that Dr. Freeman ever committed any violation of Section 215 of the Criminal Code or did or had any knowledge or information of the doing of the acts and things shown by the evidence, either in connection with any of the matters and things to which the postmasters and postoffice inspectors, or any of the other witnesses, testified upon the trial.

First. He was a large stockholder and the nominal secretary of the corporation created and existing under the laws of California under the name, "Dr. Jordan, L. J. Jordan Co. and Jordan's Museum of Anatomy", as alleged in the indictment (Tr. 2); and the Court charged the jury that,

"In order to render an officer of a corporation personally liable in a criminal action for the acts of the corporation, such officer must have *participated* in some way as heretofore explained, *in such criminal act*. The mere performance of the duties of secretary of a corporation, or the acceptance of dividends, or both combined, *cannot* render an officer of a corporation *criminally* liable for an *act* committed by another *of which he had no information or knowledge before* its commission.

> "A principal is *never* liable criminally for the act of his agent *unless* committed by direct command of the principal or with his consent. But *consent* which will render the principal liable for the act of his agent *must* be consent based on a *knowledge* of the *act about* to be committed by the agent. It *must be shown here* in order to warrant a conviction that defendant had knowledge of the fraud, if you find that fraud was committed, and that having such knowledge, he either actually participated in the offense, or as stated, aided, abetted, counseled, commanded, induced or procured such commission. The *mere opportunity* to have knowledge, without further circumstances, is not equivalent to actual knowledge" * * * (Tr. 280).

This charge being not only the law of the case, but absolutely and accurately correct in law, we proceed to point out that Dr. Freeman had no information or knowledge of any of the acts or things charged to be fraudulent and criminal, never consented to them, never participated in them, nor did he aid, abet, counsel, command, procure or induce such commission.

SECOND. The Government proved that Dr. Freeman was *certified* as a Doctor of Medicine by the *"College of Physicians and Surgeons"*, Baltimore, in 1873, and by the *"Medical Society of California"*, in 1877 (Tr. 187-188), and, by his own testimony, that he was *born* in North Carolina in 1849, was *educated* at Lake Forest College, in North Carolina, was a *soldier* during the Civil War, *graduated in medicine* in 1873, came to California in 1875, and has been here ever since, *practicing medicine* something like *thirty* years, and at time of trial was a member of the City and County Medical Society and the State Medical Society, general practice, mostly a surgeon (Tr. 250).

Fifteen or sixteen years before the trial, Dr. Freeman *bought an interest* in this Jordan Museum; began to retire about 1906, and absolutely a year or two after that, and never practiced since.

That he had *no duties* in connection with the Jordan Museum, except as secretary, and paid no attention to the business. Everything was brought to him and passed on, and he would sign anything that was brought up, nothing more. Paul Oesting mostly did the business. Dr. Freeman did not have the slightest thing to do with the management; he did not employ the doctors; in a general way he knew about the business, but not as to the details, and never inquired; went there occasionally, sometimes every day or two, stayed five minutes and saw if there was any of his personal mail; sometimes away a month, a week, two weeks; it was not neces-

sary for him to be there; he did not open the mail or have anything to do with the mail business; never directed the kind of letters or knew anything about the character of letters that were being sent out; he never examined the form letters that have been spoken of here and knows more about them now than he ever knew before; have not read them, but just heard them read; he never directed the sending of such letters to anyone; he did not know that they were sent out, letters of that character; was not cognizant at any time that these letters such as have been used here and shown here were being sent to people throughout the State by means of the mail; the doctors who were employed did not consult him about the treatment of patients or what they should do.

"I never dreamed that I was committing fraud upon anyone by being connected with that institution. I was in good faith there"; it had been established in 1870 or 1875, and he never dreamed there was anything wrong; he never entered into any plan or scheme or device with anyone for the purpose of defrauding anyone in the treatment of the sick or the afflicted; he never entered into any scheme for that purpose under the guise of the Jordan Museum of Anatomy or anything of that kind; he did not go into that business for the purpose of deceiving or defrauding the public.

> "The Jordan Museum of Anatomy was a regular museum with wax figures and invited people to visit it. An admission was charged, which was collected at the door. They

published a book at that time. During all these years it seemed to me one of the places of interest in San Francisco. This is the book that Dr. Jordan prepared, and as far as I know it was prepared in the museum when the museum came. I had it reprinted. No one previous to this time ever took any offense at that or said they were being defrauded by it. That was sold at all the book stores as well and was passed upon by the postal authorities. The book was published and circulated by the Jordan Museum people at that time, described in a medical way the effects of self-abuse and syphilis and other diseases, and besides we had the figures of wax in the museum illustrating it. It had a catalog at the end of each piece describing what it was, and people coming there and viewing these wax figures saw the effects of disease upon the human system. In those times there were doctors there who were connected with the institution who treated the diseases. Dr. Jordan was not of them in those days, but Dr. Hastings was. Dr. Jordan brought this museum from Australia about 60 or 65 years ago and sold it to the Dr. Hastings Estate, and Dr. Hastings finally died. Dr. Hastings was one of the best surgeons here in his time. Paul Oesting was in it and I bought an interest in it for $10,000; it was then valued at $30,000."

"In connection with the treatment of the diseases, the exhibition of these figures, there were doctors, and I was one of them at that time who treated patients who called at the office. I guess I was connected with the treatment of diseases about four or five years. I was actively engaged for four or five years, and better work I never did in my profession than while I was there. I made a great effort, and was as conscientious as could be with my patients. I made a conscientious endeavor to treat patients honestly and fairly and give them the best skill that I had. I did

just the same as I did when I was in general practice, absolutely. During the time I was there, I do not think any of these form letters were used. I have tried to think it over, but I have never heard of one until I saw that there. I never used them. I did not have anything to do with the making up of them, nor did I advise anyone as to how they should be constructed or what should be said in them, or in the use of them in any way, shape or manner. Those things grew up in that business after I retired. I heard of them in a general way, but I thought they were always to be used when he had an incompetent stenographer (Tr. 255).

"I never knew they were to be used regularly. If anybody had told me that the letters were used that were here yesterday, I would have surely told them that it was not true, for I never knew that such letters were written; I thought that the stenographer did the work himself. I thought the doctor dictated the matter to the stenographer, who wrote the letters. I never in my life treated a patient by mail, and said that I had examined the urine, when I had not, or said that his condition was one thing, when I believed it to be another, or say that he was sick when I knew that he was well" (Tr. 256).

The testimony of Dr. Freeman is too lengthy to quote in full, but the foregoing substantially states his case. The entire testimony of Dr. Freeman will be found in the Transcript, pages 250 to 275.

THIRD. The Government's witnesses, testifying in relation to Dr. Freeman, say:

Edward Boerner—that he was employed by the Jordan Museum from May 5, 1909, to October, 1910, *three years before* the charges in the indictment.

and his duties were stenographer and cashier, and his office in the Jordan establishment (Tr. 147).

"I got my instructions from Paul Oesting (Tr. 149). I could not say positively whether Dr. Freeman ever examined the books. When he would visit the place he would come around, sit down, sometimes in the patients' room, sometimes in the office where I was. Sometimes he would stay an hour or two, and then not long at all (Tr. 150). Dr. Freeman had access to the books if he wanted to look at them. I could not say if he ever did (Tr. 157). I received instructions from Paul Oesting; he was not a doctor. Dr. Freeman was a doctor. Oesting told me what my duties were and the important things in the office (Tr. 158-159).

"The letters were kept there, they were stereotyped letters, and some of them had been there for six months. I bought them from W. R. Whyte. I used to sign the letters with the name of Dr. Jordan. *Mr. Oesting* told me generally what to put in. He did not tell me very much, just to be careful what to write, in a jocular sort of a way, and keep out of trouble (Tr. 160). Robinson and White sent the medicines (Tr. 161).

"Dr. Freeman was *not* present when that form of letter was made. He *never* instructed me at all about these letters. He prescribed once for some one who called at the office; it was not in regard to sending out letters by mail. *He had nothing to do with that,* so far as I know (Tr. 163). He did not have an office of his own there. *Paul Oesting* appeared to be the one from whom we took our instructions. We would go to him if we wanted instructions. I do not remember that Dr. Freeman ever instructed me to send out letters (Tr. 164). I do not remember of ever getting any instructions from Dr. Freeman at all as to taking advantage

of anyone or defrauding anyone or doing anything wrong" (Tr. 166).

James T. Burns, as a witness for the Government, testified:

"During 1912 and 1913 (this is the indictment period), I was employed by the Dr. L. J. Jordan Company in the capacity of stenographer and clerk, from May, 1911, up until the the place was closed. My position was virtually the same as that of Mr. Boerner. I practically *carried on all of the correspondence in the place* (Tr. 167-168). Dr. Freeman came into the office I was located in, and the books were accessible to him. *He very rarely,* to my knowledge, *if at all, looked over these books at any time.* He would come to the office during the day; he would not stay very long; these letters were accessible to him (Tr. 168).

"I did not send any of these stock letters at the request of Dr. Freeman. I did send some of them away to different patients, different prospective patients; I know Dr. Freeman had access to these stock letters (Tr. 180). I signed the name Dr. L. J. Jordan to some of the correspondence that went out during the time I was there. There was no Dr. L. J. Jordan connected with that institution while I was there. There was no one who posed as Dr. L. J. Jordan (Tr. 181).

"I was not instructed by Dr. Freeman about the writing of any of these letters, and he never gave me any instructions of any kind or nature. He was there frequently and infrequently, sometimes stayed fifteen minutes, sometimes longer. Frequently he did not come for days" (Tr. 183-184).

"Dr. Freeman and Paul Oesting were not on very friendly terms; they did not speak. I noticed they were unfriendly and that *Oesting*

was running the business then as a rule. We took our instructions from Oesting regarding the business end, regarding the conduct of the business. The conduct of the business, the carrying on of it and the treating of the patients, that portion of it *I did not consult Dr. Freeman about at all.* The only thing that I consulted Dr. Freeman about would be in the absence of Mr. Oesting as to payment of a bill for drugs or something of that kind; anything that came up in a business way that I could not handle myself, like rent, bills for supplies and drugs (Tr. 184).

"Dr. Freeman came rather infrequently. I do not know that Dr. Freeman knew of the existence of these stock letters at the time I first went there" (Tr. 189).

Now this witness—James T. Burns—was the stenographer and clerk during the very period that the indictment charges the mailing of these letters, he was there from May, 1911, until the Museum was closed (Tr. 167); and the letters in the indictment commenced July 2, 1912 (Tr. 6) and the last was February 25, 1913 (Tr. 12); and this witness everywhere in his testimony exonerates Dr. Freeman from any connection with the writing, or sending or mailing or knowledge of any of these letters.

Dr. Harry McGarvey, testifying for the Government, said he was employed in 1914 at Dr. L. J. Jordan's, Incorporated (Tr. 211), although stating that "I have no great friendship for the people connected with Jordan's" (Tr. 219), testifying concerning the ailments and treatment of the Government's witness, H. C. Walker (Tr. 130-147), said:

"This man *Walker*—he had *rheumatism* and some *prostatic* trouble, a little prostatic enlarge-

ment, to the best of my knowledge. There was nothing wrong with his sexual manhood that I know of, or anything to indicate it. *He was treating* with the institution while I was there. My recollection is he was getting a solution of salicylate of soda for his rheumatism and a tonic containing a tincture of iron. To my knowledge, he was not receiving any treatment for lost manhood.

The rheumatism was located in his shoulders, arms, I believe. It was not in his back. He always complained of trouble in his arm and shoulder. I did not examine him to start with I *examined* him afterwards *and treated him,* but during the time he was coming to the Jordan institution, I simply followed the instructions of Dr. Rice in regard to his treatment. I do *not mean to say* that the medicines prescribed would not be of any benefit for his rheumatism. They would be of benefit to him. The remedy I mentioned is one that is used in the treatment of rheumatism, usually used. He has muscular rheumatism, what is known as that. He was able to walk when I found him. He complained of the rheumatism bothering him considerably. I could not say that he improved any afterwards. Sometime when he called he said he was feeling better, other times he said he was not so well. Eventually I prescribed different treatments for him. To the best of my knowledge, I treated him honestly and give him the best treatment I could. I was acting in good faith with him. So far as I know, *Dr. Rice was acting in good faith with him,* so in that particular case *there was no fraud* as far as I know" (Tr. 221-223).

The foregoing is, in substance, the *only* evidence in the record as to Dr. Freeman.

Upon this testimony from *the witnesses for the Government,* relating to the connection of *Dr. Free-*

man with these charges, always eliminating him from any knowledge, information, direction of the business or connection with its details, and nowhere a word showing that Dr. Freeman had any even censurable connection with the acts and things charged against him as a violation of Section 215 of the Criminal Code, or any of these letters or treatments; we respectfully submit that the evidence was clearly insufficient upon which to support the verdict and judgment against him, and we also respectfully submit that this evidence of the Government, fairly and even to a moral certainty, shows Dr. Freeman to be *innocent* of the crime charged against him.

VII.

IN THE EVENT THAT THE COURT SHOULD DEEM THAT THE GOVERNMENT HAS TECHNICALLY SUFFICIENTLY CONNECTED DR. FREEMAN WITH THE ACTS AND THINGS DONE TO SUSTAIN THE VERDICT, BUT SHOULD BELIEVE THE EVIDENCE DOES NOT SHOW HIS MORAL CULPABILITY TO THE EXTENT THAT HE SHOULD SUFFER IMPRISONMENT AND FINE, WE APPEAL TO THE COURT TO CONSIDER HIS AGE, THAT HE WAS NOT AN ACTIVE PERSONAL PARTICIPANT, AND TO MODIFY THE SENTENCE AND JUDGMENT SO THAT THE IMPRISONMENT BE REMITTED LEAVING THE FINE STANDING; AND ALSO, IN VIEW OF THE FACT THAT PAUL OESTING, UPON THE EVIDENCE SHOWS WAS THE ACTIVE MANAGER AND IN CONTROL, PLEADED GUILTY OF THE CRIME CHARGED AGAINST DR. FREEMAN, AND HIS CASE ON APPEAL WAS AFFIRMED IN 234 FEDERAL 304.

We respectfully request the Court, in the event that the Court should disagree with our views that